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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. CR 12-00293 WBS
	)	
Plaintiff,	)	UNITED STATES' TRIAL BRIEF
	)	
v.	)	
	)	
JOSE ANTONIO GUTIERREZ,	)	
	)	
Defendant.	)	
	)	
	)	

TO: THIS HONORABLE COURT, THE DEFENDANT, AND HIS ATTORNEY:

**I. STATUS OF THE CASE**

Trial of defendant Jose A. Gutierrez (Defendant) on one count of the Indictment is confirmed for September 25, 2013, before the Honorable William B. Shubb. The estimated length of the trial is two full court days for the government's case in chief. The government has subpoenaed approximately 13 federal law enforcement witnesses and two lay witnesses. Trial is by jury. Defendant is out of custody and has been on pretrial release since April 3, 2012. His release is secured by a \$20,000 personal recognizance bond.

1 On April 24, 2012, an Oakland Grand Jury returned a one-count Indictment against Defendant.  
2 The defendant was arraigned on the Indictment on July 13, 2012, and, at that time, he entered a not  
3 guilty plea. Trial will therefore proceed against Defendant on the one count charging him with forcibly  
4 assaulting a Deputy United States Marshal (DUSM) in violation of 18 U.S.C. § 111(a).

## 5 **II. FACTS**

6 On April 2, 2012, the Drug Enforcement Administration (DEA) and the Internal Revenue  
7 Service Criminal Investigation Division (IRS-CID) executed a series of federal search warrants in  
8 Oakland, California, including search warrants at a marijuana growing location known as Oaksterdam  
9 University located at 1600 Broadway, and at a marijuana dispensary known as Coffeeshop Blue Sky  
10 located at 389 17th Street. The United States Marshals Service (USMS) provided assistance for site  
11 security.

### 12 **A. Defendant's Conduct at Oaksterdam University, 1600 Broadway, Oakland**

13 As agents executed the search warrant at the 1600 Broadway location, a group of protestors,  
14 including Defendant, gathered outside on the street shouting obscenities towards the agents. That day,  
15 Defendant was wearing wearing an animal-style mask over his face, a grey sweatshirt and combat  
16 fatigue-style camouflage pants. Agents also observed him carrying a megaphone.

17 While at the 1600 Broadway location, agents also observed Defendant begin to march in a circle  
18 with other protestors in an attempt to prevent government vehicles from exiting the parking lot. As an  
19 agent attempted to shield the protestors away from the parking lot exit, Defendant stepped in front of  
20 one of the vehicles and yelled: "You hit me." As the agent removed Defendant from the front of the  
21 vehicle, Defendant stated: "It's all a game." Another agent saw Defendant encourage other protestors to  
22 block the parking lot exit before jumping onto a vehicle and yelling: "My back. You hit me." The agent  
23 then heard Defendant state: "It's all a game." A third agent saw Defendant dramatically falling onto the  
24 hood of a government vehicle and yelling that he had been injured.

25 Another agent observed Defendant urging the mob of protestors to lie down in front of a truck  
26 that contained boxes seized from the 1600 Broadway location. Defendant yelled, "Don't let them  
27 leave," and "Block them in." As the agents departed the 1600 Broadway location, another agent saw  
28 Defendant blocking a vehicle as it drove away. As the vehicle drove away, the agent had to

1 continuously push Defendant out of the way at which point the Defendant would “roll back around and  
2 get in front of the vehicle.” Defendant continued to lean on the agent as the agent tried to clear a path  
3 for the vehicle.

4 B. Defendant’s Conduct at the Coffeeshop Blue Sky, 389 17th Street, Oakland

5 Later that day, the DEA at the marijuana dispensary located on 17th Street in Oakland requested  
6 assistance from the USMS. The request came as agents from the DEA and the IRS were trapped inside  
7 the dispensary by a crowd of protesters.

8 Several Deputy U.S. Marshals (DUSMs) were the first to arrive at the Coffeeshop Blue Sky  
9 wearing distinctive law enforcement attire. They immediately took positions outside the entrance of the  
10 address to form an ad hoc barricade between the entrance and the crowd of protestors. Among other  
11 obstructive conduct, several protesters yelled into the faces of the DUSMs standing guard resulting in  
12 saliva hitting the deputies’ faces and uniforms.

13 Deputy Shaygan Shakeri, the victim DUSM, arrived after the first group of DUSMs. Deputy  
14 Shakeri was wearing a dark blue baseball cap with the USMS logo on the front; a dark blue jacket  
15 marked with a gold USMS chest logo with the words, “US MARSHAL” printed under the logo, on the  
16 back, and on both sleeves. When he arrived, he joined a group of recently-arrived DEA and IRS-CID  
17 agents who had gathered across the street from the Coffeeshop Blue Sky. Deputy Michael McCloud, a  
18 DUSM supervisor, then instructed all the federal agents to join the DUSMs standing outside the  
19 Coffeeshop Blue Sky.

20 As the federal agents walked towards the Coffeeshop Blue Sky in a line, several members of the  
21 protestors began shouting and yelling and pointing their cameras in the faces of the marching agents.  
22 Deputy Shakeri, in pertinent part, had to physically move protestors blocking his way. When Deputy  
23 Shakeri walked past Defendant, who was standing to Deputy Shakeri’s right, Defendant first elbowed  
24 Deputy Shakeri in the back, and then struck him in the back with both his hands, while holding a protest  
25 sign. Deputy Shakeri staggered forward from the force of the strike. Deputy McCloud was immediately  
26 behind Shakeri and had an unobstructed view of the strike from just a few feet away.

27 Fearing additional attacks on law enforcement, Deputy McCloud immediately attempted to arrest  
28 Defendant, but Defendant resisted. Both Deputy McCloud and Defendant then fell to the ground in a

1 struggle, and other federal law enforcement attempted to assist Deputy McCloud to place handcuffs on  
 2 Defendant. Defendant forcibly resisted arrest, attempting to strike the deputies with his knees, and  
 3 cursed at them until he was subdued in handcuffs. After law enforcement officers placed Defendant into  
 4 handcuffs, Defendant told one of the deputies: “I am done fighting. I’m not fighting anymore.”

#### 5 C. Summary of Evidence

6 Deputy McCloud will testify that he witnessed Defendant assault Deputy Shakeri when  
 7 Defendant intentionally struck Deputy Shakeri in the back while holding a sign and that Defendant  
 8 forcibly resisted Deputy McCloud’s attempts to arrest him. Other DUSMs stationed outside the  
 9 Coffeeshop Blue Sky will also testify as to their personal observations. Finally, video footage and  
 10 multiple still images, taken from different vantage points by numerous protestors that were uploaded to  
 11 publicly accessible websites, confirm Defendant’s assault of Deputy Shakeri and his subsequent actions  
 12 of resisting arrest as multiple officers attempt to subdue him. A frame-by-frame review of those videos  
 13 also depicts Defendant committing the two-part assault on Deputy Shakeri. The video footage and still  
 14 photos also confirm that Defendant was wearing an animal-style partial mask over his face along with a  
 15 grey sweatshirt and combat fatigue-style camouflage pants.

### 16 III. APPLICABLE STATUTES

17 The government has submitted applicable Ninth Circuit Model jury instructions defining the  
 18 crime of assault on a federal officer in violation of 18 U.S.C. § 111(a).

### 19 IV. EVIDENTIARY ISSUES

#### 20 A. Stipulated Authenticity

21 The parties have agreed to stipulate to the authenticity of all video footage and still images  
 22 derived from the video footage identified in their respective exhibit lists to avoid unnecessary delay, but  
 23 each party has reserved the right to object to the relevancy of any given video exhibit. Notwithstanding  
 24 the parties’ agreement, the government anticipates presenting testimony by DUSMs who are familiar  
 25 with its video and still image exhibits stating that the video and photo evidence fairly and accurately  
 26 depicts that scene at some relevant time. This is a sufficient basis for admission of the videos and  
 27 images. Fed. R. Evid. 901(a); see United States v. Brannon, 616 F.2d 413, 416 (9th Cir.), cert. denied,  
 28 447 U.S. 908 (1980); Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 973-74 (2d Cir.

1985) (citing cases).

The government further intends to use the Court's presentation equipment to show the jury any videos or photographs entered into evidence. Rather than asking the Court's permission to "publish" such information to the jury after each photograph is entered into evidence, the government respectfully requests permission to publish photographs to the jury that have been entered into evidence during the direct examination of the witness. It is not anticipated that defendant's counsel will object to such a procedure.

#### B. Expert Testimony

A witness who is "qualified as an expert by knowledge, skill and experience" may present expert testimony if his or her specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Evid. 702; United States v. Espinoza, 827 F.2d 604, 612 (9th Cir. 1987). The admission of expert testimony is a matter within the sound discretion of the trial court. United States v. Kinsey, 843 F.2d 383, 387-89 (9th Cir. 1988); United States v. Anderson, 813 F.2d 1450, 1458 (9th Cir. 1987).

The government does not intend to present any expert testimony in its case-in-chief but does expect to challenge the qualifications and relevancy of Frederick Allen, one of Defendant's two proffered experts, if called to testify.

#### C. Defendant's Statements

The government intends to introduce evidence of Defendant's statements to DUSMs during his arrest in its case-in-chief and, if the defense opens the door to the relevant testimony, Defendant's statements and actions to DEA and IRS Agents made near the Oaksterdam University prior to the offense conduct.

#### D. Cross-Examination of Defendant's Character Witnesses

If Defendant calls any witnesses from his witness list as a character witness, the government intends to cross-examine any such witness of specific instances of Defendant's past conduct relevant to the character trait at issue. Fed. R. Evid. 405(a); Michelson v. United States, 335 U.S. 469, 479 (1948). However, Defendant may not, on direct examination, ask about specific instance of conduct. Fed. R. Evid. 405(a).

1 E. Chain of Custody

2 Evidence regarding the chain of custody concerning an item of seized evidence goes to the  
3 weight as opposed to the admissibility of the evidence. United States v. Robinson, 967 F.2d 287, 292  
4 (9th Cir. 1992). Defendant has not raised any issues on this topic prior to trial and has not notified  
5 government counsel of any claims of impropriety in evidence handling at this time.

6 F. “Missing Witness” Argument

7 The government believes that there may be witnesses that neither party chooses to call to testify.  
8 A prosecutor’s comment on a defendant’s failure to call a witness does not shift the burden of proof and  
9 is therefore permissible so long as there is no comment on Defendant’s failure to testify. United States v.  
10 Cabrera, 201 F.3d 1243, 1249 (9th Cir. 2000); United States v. Hernandez, 145 F.3d 1433, 1439 (11th  
11 Cir. 1998). A “missing witness” instruction is proper only if from all circumstances an inference of  
12 unfavorable testimony from absent witness is natural and reasonable one. United States v. Bramble, 680  
13 F.2d 590, 591 (9th Cir. 1982).

14 G. Jencks Discovery

15 The government has produced Jencks material to defense counsel in its Rule 16 discovery. Any  
16 additional material will be produced as it becomes available. It is not, however, anticipated that  
17 production of Jencks material will cause delays in the trial.

18 H. Presentation of Witnesses

19 It is possible that the government may have to call certain witnesses out of order or recall  
20 witnesses to testify to various events to maintain a chronological presentation. This should provide for  
21 an orderly presentation of the evidence and assist the jury, the court, and Defendant in understanding the  
22 evidence being presented.

23 I. Prior Inconsistent Statements

24 If Defendant chooses to put on a defense, the government anticipates that there may be defense  
25 witnesses who have given prior inconsistent statements. Any prior statements not made under oath will  
26 be admissible only as impeachment evidence, and the Court should give a limiting instruction to that  
27 effect.

1 J. Recording or Broadcasting From Court

2 Federal Rule of Criminal Procedure 53 prohibits photographing, videotaping or broadcasting of  
3 judicial proceedings from the courtroom. Given the publicity surrounding the execution of federal  
4 search warrants on April 2, 2012, the government anticipates numerous spectators to attend the  
5 courtroom proceedings, some of whom may attempt to record or broadcast the proceedings on the  
6 Internet as they had done with their video recordings during the execution of the Oaksterdam search  
7 warrants. The government respectfully requests that the Court ban all electronic devices in the  
8 courtroom galley and instruct courtroom security officers to confiscate any electronic devices brought  
9 into the courtroom by spectators.

10 **V. POSSIBLE DEFENSES**

11 Defendant has not given notice of any defense for which the Federal Rules of Criminal  
12 Procedure require notice. Therefore, the government will move to bar any such defense if it is raised  
13 during trial.

14 Defense counsel also raised a potential entrapment defense in its various motions, but at the  
15 September 5, 2013 motion hearing, defense counsel withdrew the entrapment defense. If the defense  
16 raises entrapment at trial, the government would be entitled to present evidence that Defendant was  
17 predisposed to commit this type of crime.

18 Finally, Defendant has indicated that he intends to place the issues of his intent and “accidental  
19 contact” in dispute at trial. In multiple pleadings, Defendant claims that his physical assault on Deputy  
20 Shakeri was not intentional, but instead the result of accidental contact caused by a “surge” of protestors  
21 either orchestrated by law enforcement or caused by the negligence of the USMS. Defendant’s crowd  
22 surge conspiracy theory is set forth repeatedly in his pleadings.

23 **VI. WITNESS EXCLUSION & CASE AGENT DESIGNATION**

24 The government will move for the exclusion of all witnesses until their testimony has been  
25 completed, pursuant to Fed. R. Evid. 615. The government will further move that DUSM David Siegel  
26 be designated as case agent and be exempt from the exclusion order pursuant to Federal Rule of  
27 Evidence 615. See United States v. Little, 753 F.2d 1420, 1441 (9th Cir. 1985).

1 In addition, under Federal Rule of Criminal Procedure 60, the Court must not exclude Deputy  
2 Shakeri, the victim federal agent in this case, unless the Court determines by clear and convincing  
3 evidence that the victim's testimony would be materially altered if the victim heard other witnesses  
4 testify.

5 **VII. CONCLUSION**

6 The foregoing is a summary of points the government anticipates may arise at trial. Should any  
7 legal issues arise that have not been covered in this trial brief, the government respectfully requests  
8 leave to submit such further memoranda as may be necessary.

9  
10 DATED: September 18, 2013

Respectfully submitted,

11 MELINDA HAAG  
12 United States Attorney

13  
14 /s/  
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